SUPREME COURT, U. S.
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-142

H. B. GREGORY COMPANY,

and

JAMES H. GREGORY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari

To the United States Court of Appeals
for the Seventh Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No._____

H. B. GREGORY COMPANY,
and
JAMES H. GREGORY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

Petition For A Writ Of Certiorari

To the United States Court of Appeals
for the Seventh Circuit

Petitioners H. B. Gregory Co., a corporation, and James H. Gregory, an individual, pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Seventh Circuit entered March 14, 1974, in which their motion for rehearing was denied June 25, 1974 action #73-1744, wherein by a divided court their conviction under the Federal Drug and Cos-

metic Act, 21 U.S.C. 331 (K) in the U.S. District Court for the Eastern District of Wisconsin was affirmed, and that on hearing the judgment of conviction be reversed or modified.

OPINIONS IN THE COURTS BELOW

The opinion of the U.S. Circuit Court of Appeals is reported in Food, Drug and Cosmetic Law Reports, Commerce Clearing House, par. 41,111. Appendix 1.

The opinions of the U.S. District Court for the Eastern District of Wisconsin have not been and will not be reported. Appendix 2.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on March 14, 1974. Timely Motion for Rehearing was filed and was denied on June 25, 1974. This Court has jurisdiction under 28 U.S.C.A. par. 1254(1).

QUESTIONS PRESENTED

I. Are the defendants entitled to the benefit of tolerances under 21 U.S.C.A. par. 346 of the Food, Drug and Cosmetic Law?

II. When during the course of a single inspection at a single warehouse an inspector finds that food was held under unsanitary conditions, does this constitute a single offense for the purpose of punishing the defendants, or does it constitute as many offenses as the prosecution designates through counts? Were defendants overly punished?

III. When an officer of a corporation which stores food is not shown to be personally negligent or at fault,

may he be punished solely because he stands in a responsible relation to the corporation?

IV. When a court pronounces sentence upon a defendant in a misdemeanor case, is it proper to threaten him with imprisonment upon his next offense? Is this not in effect prejudging the next case?

SECTION OF U.S. CONSTITUTION INVOLVED

Amendment XIV.

"Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

THE STATUTES INVOLVED

Federal Food, Drug and Cosmetic Act— 21 U.S.C. Sec. 301

"The following acts and the causing thereof are hereby prohibited: . . . .

• • •

(k) . . . the doing of any . . . act with respect to, a food . . . if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated . . .

• • •

Section 402 (21 U.S.C. 342)

A food shall be deemed to be adulterated —

(a) . . . (3) if it consists in whole or in part of any filthy . . . substance . . . or (4) if it has been . . . held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

• • •

21 U.S.C.A. Section 346

Tolerances for Poisonous or Deleterious substances in food: Regulations.

When any poisonous or deleterious substance cannot be avoided by good manufacturing practice, the secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2)A of Section 342(a) of the title.

* * *

21 U.S.C.A. Section 333

"Penalties — Violation of Section 333 of this title . . .

(a) Any person who violates Section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000.00 or both."

RULES AND REGULATIONS INVOLVED

Commerce Clearing House, Food, Drug and Cosmetic Law Reports, par. 50,075, page 51,049 ff.

"TOLERANCES FOR FILTH OR DECOMPOSITION"

The Food and Drug Administration's list of current levels for natural or unavoidable defects in food for human use that presents no health hazard, as of April 10, 1973 is reproduced below:

Flour and Corn meals . 1 rodent hair per 25 grams.
. 1 rodent excreta fragment per 50 grams.

Condimental seeds, other than fennel seeds and sesame seeds . . . average of 3 miligrams of excreta per pound.

* * *

21 C.F.R. 128.10(c)

> "Compliance with defect action levels does not excuse failure to observe either the requirements in Section 402(a)(4) of the Federal Food Drug and Cosmetic Act that food may not be prepared, packed or held under insanitary conditions or the other requirements in this part that food manufacturers must observe current good manufacturing practices. Evidence obtained through factory inspection indicating such a violation renders the food unlawful, even though the amounts of natural or unavoidable defects are lower than the currently established levels."

STATEMENT OF THE CASE

The information, which was dated December 8, 1972, charged the petitioners with a misdemeanor, holding four bags of food in a building that was accessible to mice, and that it was held under insanitary conditions whereby it may have become contaminated with filth. Therefore the food was deemed to be adulterated. There were 4 counts relating to (1) a 100 pound bag of yellow snack meal, (2) a 110 pound bag of poppy seed, (3) a 110 pound bag of caraway seed and (4) a 100 pound bag of corn grits. The first count alleged in addition that mouse pellets were present in the food.

The testimony established that the H. B. Gregory Co. is a Wisconsin corporation engaged in the sale of bakery supplies at 225 South Second Street, Milwaukee. From March 20, 1972 to March 24, 1972 Inspector Robert Brett of the Food, Drug and Cosmetics Administration inspected the warehouse of the H. B. Gregory Co. (Transcript page 31)

The bakery supplies were, for the most part, packed in four ply paper bags. This meant that there were four

separate layers of paper on each bag. If one or more of the outer layers became soiled or spotted, it was possible to remove them. This is known as "scalping the bag." The contents would still be held securely and protected by the remaining layers. It was also possible to remove the contents of the bag and to repack them in another bag which was not soiled. The Food & Drug Administration approved these remedies, and Inspector Brett supervised their application in the H. B. Gregory Co. warehouse. (Transcript pages 75-76)

The practice of the H. B. Gregory Co. was not to store bags of food on the floor. Instead they were stored on pallets. The pallets were small wood structures which had space under them so that a lift truck could be inserted, the bags could be lifted and transported around the warehouse. Accordingly, mouse pellets on the floor would not be in the food. The pallets were approximately 4 inches high. (Transcript page 72)

The practice of the H. B. Gregory Co. was to use traps to protect against mice. They did not use poison. It is a violation of the Food, Drug and Cosmetic Law to contaminate foods with rodenticide. Even if poisons are used carefully, there is a risk that mice might consume the poisons and die on the premises. This is evidence against the warehousemen. (Transcript pages 77-79)

Inspector Brett found a 100 pound sack of yellow snack meal with a hole in it. He found two mouse pellets mixed with the yellow snack meal in the bag and removed them with a tea spoon. (Transcript page 48)

He found mouse pellets and urine stains on the outer surfaces on this bag, of a bag of poppy seed, a bag of caraway seed, and a bag of corn grits. (Transcript pages 36, 40, 44-45)

He took samples of the contents of each of these bags, and except for the corn grits, laboratory examination showed the contents to be wholesome and fit for human consumption. (Transcript pages 108, 117)

The four bags in question had all been purchased by and delivered to the H. B. Gregory Co., a corporation, and none of them had been purchased by or delivered to the defendant, James H. Gregory. The facts with respect to him were that he was the President and Treasurer of the H. B. Gregory Co., that he was in charge of the sanitation program, and that he gave directions where to store food and when to load trucks for customers. (Transcript page 68)

The parties had no previous criminal records and this was a first offense. Judge Myron Gordon of the District Court found each of the defendants guilty on each of the four counts. He fined the H. B. Gregory Co. $1,000.00 on each of the 4 counts, total $4,000.00. He fined James H. Gregory $500.00 on each of 4 counts, total $2,000.00 and so arrived at a grand total of $6,000.00. He said "I don't believe it is an appropriate case for imprisonment, but I would suggest that further violations would unquestionably provoke such imposition of imprisonment in my judgment." (June 11, 1973, Transcript page 6) (A2-19)

The defendants appealed to the U.S. Circuit Court of Appeals, which affirmed Judge Gordon's ruling. Judge Campbell concurred in part and dissented in part. He found that there were only two offenses, holding food for sale in which there were mouse pellets and holding food for sale which was held under unsanitary conditions, and he would have reduced the fines from 4 to 2, and he would have reduced the grand total of fines from $6,000.00 to $3,000.00.

The defendant, H. B. Gregory Co., submits that there was no proof that two mouse pellets in a 100 pound bag in which there were over 40,000 grams exceeded the permissible tolerance of one rodent excreta fragment per 50 grams. Therefore it should not have been found guilty of holding adulterated food for sale. The trial court might properly have found H. B. Gregory Co. guilty of holding food for sale under unsanitary conditions, a single offense calling for a maximum fine of $1,000.00. It asks that the fine imposed upon it be reduced from $4,000.00 to $1,000.00.

The defendant, James H. Gregory, submits that he was not proven to have committed any offense as an individual and that the fine in the sum of $2,000.00, imposed upon him be abated, or if the court should find that he committed an offense, that the fine imposed upon him be reduced from $2,000.00 to $500.00.

REASONS FOR GRANTING THE WRIT

I. When the Pure Food and Drug Law was adopted in 1906, there was no provision for tolerances. The provision for tolerances was adopted by an amendment to the Act in 1938, 21 U.S.C.A. par. 346. The concept was that it is impossible to maintain 100% purity of food products. The chief proponents of the amendment were farmers and their congressmen, and in particular the apple growers in the State of Washington. They were accustomed to spraying their apple trees against worms. The spraying left minute quantities of lead on the apples, and the amendment was intended, among other things, to require the government to certify what quantity of lead might be tolerated, provided always that it did not constitute a threat to the health of consumers.

Similarly mice are free agents which are attracted to food, which they need in order to live. When food is handled in bulk, it is necessary to open warehouse doors when it comes in and when it goes out. No means has been found to eliminate mice and so Congress has required that a tolerance be set, and the government has set one, namely 1 rodent excreta fragment per 50 grams.

The Department of Justice does not recognize the effectiveness of Section 346 and contends that the duty to keep food free of excreta of mice is absolute. In this it is supported by the decision of a U.S. District Court in Iowa, **U.S. v. Lazere,** 56 F. Supp. 730, 733 (1944)

> "The Federal Food Drug and Cosmetics Act does not provide that parties should avoid doing such things if at all possible, it provides that it shall not be done at all." page 733.

The Department of Justice relies further upon a regulation published in 21 C.F.R. 128(10) (c) which provides that food may not be held under insanitary conditions, even though the amounts of natural or unavoidable defects are lower than the currently established action levels.

The defendants contend that this regulation contravenes an act of Congress, Section 346, and that for this reason it is a nullity.

Lynch v. Tilden Produce Co., 265 U.S. 315 (1923)

Moreover, the Circuit Court of Appeals for the 7th Circuit has recognized and applied the tolerances in **U.S. v. 1500 Cases More or Less,** 236 F. 2d 208, 214 (1956). The tolerance for mould in tomato paste was 40%, and the court held that tomato paste with more than 40% mould should be condemned and that tomato paste with less than 40% mould could not be seized.

The opinion of the 7th Circuit Court of Appeals in the Gregory Case, the case at bar, does not discuss tolerances, and when defendants cited its previous decision, **Supra,** in a reply brief, upon their motion for rehearing, the court declined to accept the brief by its order dated July 3, 1974. A copy of the brief which the Court declined to receive is attached hereto as Appendix III. (A3-21)

The prosecution further argues that if the tolerances are effective, which it denies, the defendants exceeded the tolerance for mice because Inspector Brett removed two mouse pellets from a 100 pound bag of snack meal with a teaspoon, and the concentration in the teaspoon exceeded the tolerance of 1 fragment of excreta in 50 grams.

Defendants submit that this is unfair. The proper measure is the contents of the bag, namely 100 pounds, or if the court chooses to follow the practice of the Chicago office of the Food, Drug and Cosmetics Administration, a proper sample is the square root of the contents of the bag, namely 10 pounds. The question then would be whether two mouse pellets in a 10 pound sample exceeds the tolerance of 1 fragment of excreta in 50 grams. The prosecution tried its case upon the theory that there is no tolerance, and submitted no proof that the tolerance had been exceeded. If the tolerance is effective, the prosecution did not prove its case.

II. The trial court should have looked through the multiplication of counts to find a single offense, holding food for sale under insanitary conditions, and should have imposed a single penalty. The defendants were overly punished.

In the Gregory case during the course of a single inspection of the Gregory warehouse in Milwaukee, Inspec-

tor Brett found fault with four bags of food, and the prosecution claimed four violations of the Food, Drug and Cosmetics Law and asked four separate fines against the H. B. Gregory Co. and four separate fines against James H. Gregory, its president. This multiplication of counts was deemed ground for reversal by the Supreme Court of the United States in **Bell v. U.S.,** 349 U.S. 81 (1955), where the defendant was convicted of conducting women across state lines in his automobile for the purpose of prostitution. The prosecution set up a separate count for each woman, and the court below imposed successive sentences on each count. The Supreme Court held that there was but a single trip in a single automobile, and but a single offense. Hence, only a single sentence could be imposed. To the same effect is **Willard Mack Robinson v. U.S.A.,** 143 F. 2d 276, 277-278 C.C.A. 10th (1944), where the Court stated:

> "The same transaction may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which constitutes a completed offense. But the same evidence must be applied with some discrimination. Merely because one element of a single criminal act embraces two persons or things, a prosecution may not carve out two offenses by charging the several elements of the single offense in different counts and designating only one of the persons or things in one count and designating only the other person or thing in the other count. . . . ."
>
> "We think an analogy may be drawn with larceny at common law . . . If a person drove a vehicle to the barn of another and unlawfully and feloniously loaded the vehicle with 25 sacks of corn, which had been stored in the barn by the owner, and carried it away with the intent permanently to deprive the owner of the possession thereof, such person would be guilty of a single larceny, although he loaded

each sack into the vehicle separately and had an unlawful intent as to each sack of corn. It would constitute a single offense, even though the corn taken belonged to different owners, because there would be one single act of taking and carrying away."

The majority of Circuit Court of Appeals in the Gregory case distinguished these cases upon the ground that they were not cases under the Food, Drug and Cosmetics Law, and cited **Akin Distributors of Florida Inc. v. U.S.,** 399 F. 2d 307 (C. A.5, 1968) and **V. E. Irons v. U.S.,** 244 F. 2d 34, 45 (C.A. 1, 1957).

Judge Campbell dissented in the Gregory case and posed the following question: "Suppose that there were two warehouses, one belonging to a grocery chain which handled 100 different items and one devoted to the storage of a single item. Is it fair to bring 100 counts against the grocer and only one against the warehouseman who stored a single item?"

The aptness of Judge Campbell's observation is demonstrated by the case of **U.S.A. v. Kroger Company, Inc.** et al, which is reported in the **Cleveland Press** of June 14, 1974. The Kroger Co. supplied a chain of grocery stores from a warehouse in Solon, Ohio. A government inspector found evidence of mice there and the Kroger Co. and three of its officers were prosecuted on 10 counts. There is no stopping place!

No reason is apparent why persons engaged in the food business who are unintentional victims of mice should be treated worse than criminals who commit crimes intentionally. To thus discriminate against persons in the food business is to deny them the equal protection of the laws assured to them under the 14th amendment to the Constitution of the United States.

III. Before the year 1943, it was necessary for the prosecution to prove that an individual charged with a crime or misdemeanor had a causal relation to the condition for which he was prosecuted. In his article entitled **Public Welfare Offenses** — 33 Columbia Law Review 55 (1933), Francis B. Sayre gives the following example of strict liability:

> A shoots B intentionally causing injury. This was a crime at common law. A shoots B unintentionally causing injury. This was not a crime at common law because criminal intent was lacking. Under strict liability, the element of intent was removed, and A's unintentional shooting of B became criminal. However, in 1933 when Professor Sayre's article was published, the element of cause remained. In both instances, A had caused B's injury.

In 1943 the Supreme Court of the United States decided **U.S.A. v. Dotterweich,** 320 U.S. 277 (1943), a drug case. By the vote of five Justices to four a responsible relation was substituted for a causal relation. The Buffalo Pharmacal Co., of which Dotterweich was president, had been found not guilty by the jury in the trial court, and unless Dotterweich could be held, nobody could be held. The basis for the decision was the balancing of interests, the interest of Dotterweich in remaining free against the interest of the public in having accurately labeled drugs. This was judicial legislation which has been followed in cases involving food.

Now that a generation has passed, it is time for the Court to review Dotterweich. Through its harsh rule, innocent people have been imprisoned, and yet the mice which cause the problem in food cases go right on being mice. The policy of punishing innocent people in the hope that they will control the mice has not worked.

In **U.S.A. v. John R. Park,** Food, Drug and Cosmetics Law Reports, par. 41,167 C.C.A. 4th, July 2, 1974, the defendant was the President of Acme Markets, Inc., a corporation which had mice. The jury was instructed that Mr. Park "was a corporate officer, who, under law, bore a relationship to the receipt and storage of food which would subject him to liability under **United States v. Dotterweich,** 320 U.S. 277 (1943)."

The jury found Park guilty, and the Circuit Court of Appeals reversed, upon the ground that the instruction was in error.

"As a general proposition, some act of commission or omission is an essential element of every crime. For an accused to be convicted it must be proved that he was in some way personally responsible for the act constituting the crime. . ."

"It is the defendant's relation to the criminal acts, not merely his relation to the corporation which the jury must consider. . ."

"In sum, the court told the jury that Park would be guilty if it were shown that he 'had a position of authority and responsibility in the situation out of which these charges arose.' This instruction, taken in combination with other parts of the charge related above, might well have left the jury with the erroneous impression that Park could be found guilty in the absence of 'wrongful action' on his part."

"Upon a subsequent trial the jury should be instructed that a finding of guilt must be predicated upon some wrongful action by Park. That action may be gross negligence and inattention in discharging his corporate duties

and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of food."

Footnote 7. "It would appear that the question of causation will be a principal issue upon a retrial. The question of causation is to be distinguished from that of intent. U.S. v. Sheridan, 329 U.S. 379 (1946)."

The Dotterweich doctrine has received unfavorable criticism by legal scholars:

> "In the public interest of insuring prudence in the conduct of the business of the Buffalo Pharmacal Co., a majority of the Justices deemed it wise to place a criminal stigma on the defendant, a stigma that is predicated wholly upon chance, for it necessarily follows that in the absence of fraud, participation, acquiescence or even negligence, the act of adulteration and misbranding was not within Dotterweich's power of human control." 19 Indiana Law Journal, 265, 268.
>
> Vincent A. Kleinfeld — **A Court of Food and Drug Appeals;** The Business Lawyer — November, 1970.
>
> James J. Hippard — **The Unconstitutionality of Criminal Liability Without Fault, an Argument for a Constitutional Doctrine of Mens Rea,** 10 Houston Law Review — 1039, 1047, 1052, 1057, July, 1973.

The proposed New Federal Criminal Code, par. 305 is to give relief:

> **"Causal Relationship between Conduct and Result."**
>
> "Causation may be found where the result would not have occurred but for the conduct of the accused operating either alone or concurrently with another cause, unless the concurrent cause was clearly suffi-

cient to produce the result and the conduct of the accused clearly insufficient."

Final Report of the National Commission for Reform of Federal Criminal Laws established by Congress in Public Law 89-801.

Louis B. Schwarz, the Director of the U.S. Government Printing Office, 1971, page 31.

Louis B. Schwarz, the director of the National Commission, mentioned Dotterweich in an article which he wrote with Edmund G. Brown entitled **"Offenses Redefined under Proposed Federal Criminal Code, 56 American Bar Association Journal,** 1181, 1182. In a footnote he says that Dotterweich is to be sharply curtailed.

In answer to the defendants' plea upon this point, the Court below stated that the Dotterweich substitution of responsible relation for causal relation was developed by the Supreme Court of the United States, and until remedial legislation is adopted, only the Supreme Court of the U.S. can change it.

There is a conflict of authority between the holding of the 7th Circuit in the case at bar and the holding of the 4th Circuit in **U.S.A. v. Park, Supra.**

IV. When the trial judge sentenced James H. Gregory for a misdemeanor, first offense, the Court made the following statement:

"I don't believe it is an appropriate case for imprisonment, but would suggest that further violations would unquestionably provoke such imposition of imprisonment in my opinion." (A2-19)

Was this fair? The defendant, James H. Gregory, neither intended to have mice, nor had he caused the entry of mice into the warehouse of the H. B. Gregory Co., nor did the prosecution prove that he was causally negligent. According to an article published in The Milwaukee Sentinel of February 21, 1974, Dr. Alexander Schmidt, the F. D. A. Commissioner made the following statement during a hearing before a sub-committee of the U.S. Senate dealing with Monopoly:

> "I could go into the kitchen of the home of every individual in this room and shut it down as unsanitary," Schmidt said.
>
> "We could readily shut down every pharmaceutical plant in the United States if we went in, as I would go into your kitchens, looking for dirt," he said.

The remarks of the trial court to Mr. Gregory were intended to and did cause terror in a situation in which he is virtually helpless. The Food and Drug Administration was not intended to be and should not be an engine for the destruction of the liberties of the American people, and the courts should not permit this situation to continue. When the next mouse enters the Gregory warehouse, with what confidence can Mr. Gregory appear before Judge Myron Gordon, who has already prejudged his case?

When Mr. Gregory raised this question before the Circuit Court of Appeals, the Court remained silent. Anyone who reads its opinions would not know that this issue is in the case.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment entered June 25, 1974 by the United States Court of Appeals for the 7th Circuit.

August 16, 1974.

Respectfully submitted,

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APPENDIX 1

Opinion of the U.S. Circuit Court of Appeals of the 7th Circuit with dissenting opinion of Judge Campbell.

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973

No. 73-1744
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
H. B. GREGORY Co., a corporation, and JAMES H. GREGORY, an individual,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 72-CR-208
MYRON L. GORDON,
Judge.

ARGUED DECEMBER 6, 1973 — DECIDED MARCH 14, 1974

Before HASTINGS and KILEY, *Senior Circuit Judges,* and CAMPBELL, *Senior District Judge**.

HASTINGS, *Senior Circuit Judge.* This appeal is concerned with alleged violations of the Federal Food, Drug, and Cosmetic Act, Title 21, U.S.C. § 301 et seq. (the Act), and, specifically, of 21 U.S.C. § 331(k).

A four-count information was filed December 22, 1972, naming as defendants, H. B. Gregory Co., a Wisconsin corporation, and James H. Gregory, its president and treasurer, individually. The Gregory Company operated a bakery supply warehouse and supplied therefrom ingredients to bakeries throughout the Milwaukee metro-

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

politan area. Mr. Gregory had personal responsibility for all operations of the warehouse.

The information charged defendants with violating § 331(k)[1] for having caused four lots of food, *i.e.*, corn meal (Count I), poppy seed (Count II), caraway seed (Count III), and corn grits (Count IV), to become adulterated while these foods were held for sale at the Gregory warehouse after shipment in interstate commerce.

Two separate specifications of adulteration were alleged: (1) that the food in all four counts was adulterated within the meaning of 21 U.S.C. § 342(a)(4),[2] in that it was held under insanitary conditions whereby it may have become contaminated with filth; and (2) that the corn meal in Count I was adulterated within the meaning of 21 U.S.C. § 342(a)(3),[3] in that it consisted in part of a filthy substance by reason of the presence in the corn meal of rodent excreta pellets.

The case was tried to the court, without the intervention of a jury, the Honorable Myron L. Gordon, District Judge presiding. There was little dispute about the basic evidentiary facts. The trial court found each defendant guilty on all four counts and entered judgment accordingly. Subsequently, the court sentenced the Gregory Company to pay a fine of $1,000 on each of the four counts, a total of $4,000, and sentenced Mr. Gregory to pay a

---

[1] § 331. Prohibited acts
The following acts and the causing thereof are prohibited:
* * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

[2] § 342. Adulterated food
A food shall be deemed to be adulterated —
(a) * * * (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; * * *.

[3] § 342. Adulterated food
A food shall be deemed to be adulterated —
(a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

fine of $500 on each of the four counts, a total of $2,000. There was no sentence of imprisonment as to Mr. Gregory. Thereafter, the court denied defendants' petitions for a reduction and modification of these sentences. This appeal followed.

A concise statement of the issues raised on this appeal follows: (1) whether the Government proved its case against each defendant beyond a reasonable doubt; (2) whether the trial court erred in imposing fines on each defendant on each of the four counts; and (3) whether the trial court abused its discretion in denying defendants' petitions for reduction or modification of the sentences.

We have read the entire transcript of the evidence introduced in this trial, as well as the record of the proceedings before Judge Gordon. It should be noted at the outset that the trial court rejected an offer of the corporate defendant, Gregory Company, to change its plea from not guilty to guilty for the reason that its co-defendant elected not to permit any corporate officer to waive his Fifth Amendment privilege for the purpose of testifying that there was corporate authority to do so. The court properly honored this privilege and as a result was compelled to reject the corporate offer. The Government put on its case with employees of the United States Food and Drug Administration (FDA) in one day and rested. The defendants, having cross-examined such witnesses, rested without introducing any evidence. It is on this state of the record that this appeal is submitted for our consideration.

INTERSTATE SHIPMENT OF FOOD

It is beyond dispute that as to Count I the defendant Gregory Company received a number of bags of corn meal on or about March 14, 1972, which had been manufactured by Evans Milling Co., Inc., and shipped by it in interstate commerce from Indianapolis, Indiana. The bags were each labeled as containing 100 pounds net EMCO degerminated yellow snack meal. They were held for sale in the Gregory Company warehouse until at least on or about March 22, 1972,

Similarly, as to Count II the defendant Company received a number of bags of poppy seed, and as to Count III, a number of bags of caraway seed, on or about March 8, 1972. These two shipments were products of The Netherlands and were shipped in interstate commerce from New York, New York, by Transit Trading Company. The bags were each labeled as containing 109 pounds net of the respective products, and were held for sale in the Gregory warehouse until at least on or about March 21, 1972.

Finally, as to Count IV the defendant Company received a number of bags of corn grits on or about February 21, 1972, which had been manufactured by Evans Milling Co., Inc., and shipped by it in interstate commerce from Indianapolis, Indiana. The bags were each labeled as containing 100 pounds net EMCO degerminated special grits, and were held for sale in the Gregory Company warehouse until at least on or about March 22, 1972.

EVIDENCE RELATING TO ADULTERATION

FDA Inspector Robert G. Brett, Jr., was assigned to inspect the Gregory warehouse. After testifying in support of the interstate shipment of the four lots of food in question, he testified in detail about his inspection of the warehouse covering a five-day period of March 20-24, 1972. Without relating here this detailed step by step inspection and its results, it is sufficient to state that, as to the lot of corn meal specified in Count I, in addition to rodent excreta pellets and a rodent urine stain on the bag material, the inspector found a rodent gnawed hole in one of the bags, two rodent excreta pellets in the corn meal itself inside the bag, and at least 60 rodent excreta pellets in corn meal which had spilled from the hole onto the warehouse floor. Inspector Brett further stated that, as to the lots of poppy seed, caraway seed and corn grits specified in Counts II, III and IV, he found on the bag material surfaces numerous rodent excreta pellets and multiple rodent urine stains, as well as numerous rodent excreta pellets on the floor beneath the bags. He also testified that he observed other general insanitary conditions throughout the warehouse during his inspection. He found that 75 percent of the small

rodent traps in the warehouse were unbaited. He observed various potential rodent entryways in the areas of the receiving and shipping dock and the boiler room. Brett reported a rodent entry in the shelving behind the lot of adulterated corn meal above referred to, rodent tracks in the spilled corn meal from this lot, and a rodent burrow in the enclosure of the warehouse syrup tank.

Inspector Brett testified that he collected samples of the rodent excreta pellets, urine stains and food in the several lots. FDA Analytical Chemists Trauba, Carlson, Melchior, Palmer and Netz each testified that their respective analyses of the samples Inspector Brett collected confirmed that they consisted of rodent excreta pellets and rodent urine stains.

As above stated, the corn meal found in one bag was actually shown to be unfit for human consumption. No such showing was made as to the other lots of food.

Inspector Brett took numerous photographs of the warehouse area and the various lots of food he inspected depicting the conditions he found during the five-day period. These photographs were introduced and received in evidence.

EVIDENCE RELATING TO MR. GREGORY

Inspector Brett testified that when he first arrived at the warehouse he inquired of the bookkeeper for Mr. Gregory. Upon learning that he was not in, Inspector Brett identified himself and was given permission to enter the warehouse. He first saw Mr. Gregory on the third day of his inspection when Mr. Gregory observed him taking photographs and inquired what he was doing. A brief conversation ensued concerning the bad condition of some shelving being photographed. At the conclusion of the fifth day of the inspection, Inspector Brett made an appointment with Mr. Gregory and gave him a list of the samples he had collected and the insanitary conditions he had found during his inspection.

In the course of this conversation, Inspector Brett stated that Mr. Gregory said he was president and treasurer of the H. B. Gregory Company; that he was

in charge of the sanitation program and specifically the rodent control program in the warehouse; and that he was there on a daily basis. Further, Inspector Brett observed during his inspection that Mr. Gregory was giving the employees directions concerning where to store lots of food materials and was giving directions to load out trucks to his customers. The only other persons he observed employed at the warehouse were the bookkeeper and two warehouse employees. One of the two warehouse employees was working in the syrup area and the other was engaged in receiving and shipping food materials.

Inspector Brett testified that during this final conference Mr. Gregory did not question his findings which he submitted in writing. Mr. Gregory did say that he felt the building was too old to be made rodent proof; he discussed two new "wind up" mouse traps he was purchasing; and he asked for any suggestions Inspector Brett might have concerning the rodent problem within the warehouse. The inspector declined to make any such suggestions because of his lack of qualifications but did propose a different manner of storing the food materials. Mr. Gregory responded that the warehouse was too small to make the suggested storage changes.

I.

It is common knowledge, of which the court may take judicial notice, that the four lots of food at issue are foods within the meaning of the Act, 21 U.S.C. § 321(f).[4] *Cf. United States* v. *O. F. Bayer & Co.*, 2 Cir., 188 F.2d 555, 557 (1951). It is well established that "[*a*]*ll articles*, compound or single, *not intended for consumption by the producer, are designed for sale*, and because they are, it is the concern of the law to have them pure." *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 54 (1911) (emphasis added). *Accord, United States* v. *Kocmond*, 7 Cir., 200

[4] § 321. Definitions; generally
For the purposes of this chapter —
• • • •
(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

F.2d 370, 372-373 (1952), cert. denied, 345 U.S. 924 (1953); *United States* v. *Cassaro, Inc.*, 1 Cir., 443 F.2d 153, 155-156 (1971). It has been held that the purpose of § 331(k), *supra*, is "to safeguard the consumer from the time the food is introduced into the channels of interstate commerce to the point that it is delivered to the ultimate consumer • • •." *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92 (1964), citing *Kocmond*, *supra*, 200 F.2d at 372.

These holdings should lay to rest defendants' argument that the lots of food were not held for sale because (1) the one lot of corn meal was so filthy it was no more than "garbage" and would not be offered for sale under any conditions, and (2) the contaminated outer surfaces of the bags of the other foods would be discarded and the otherwise wholesome contents would be repacked.

The oft cited case of *Berger* v. *United States*, 8 Cir., 200 F.2d 818 (1952), lays down the definitive "reasonable possibility" test now generally accepted in cases involving adulterated food under § 342(a)(4), *supra*, wherein the court, at 821, states:

> It is clear that the congressional intent is to make it a criminal offense for a person to • • • hold food under such insanitary conditions that it *may* become contaminated. *It is not necessary that it actually become contaminated.* [Emphasis added.] • • • [T]he statute is designed to prevent adulterations "in their incipiency" by condemning insanitary conditions which *may* result in contamination. [Emphasis by the court.]
>
> • • • The condition condemned by the statute, which must be proved to support a conviction, is one which would with *reasonable possibility* result in contamination. [Emphasis added.]

In *Wiesenfeld*, *supra*, 376 U.S. at 91-92, the Court explicitly declares that § 331(k) prohibits any act which results in adulteration of the product, and that food is adulterated if it has been held "under insanitary conditions whereby it *may* have become contaminated with filth." (Emphasis added.)

It becomes readily apparent that, under the standards above outlined, there was sufficient evidence to warrant the trial court in finding beyond a reasonable doubt (1) that the insanitary conditions found in the Gregory warehouse were such that there was a reasonable possibility that the four lots of food might become contaminated with rodent filth; and (2) that the corn meal in Count I was actually contaminated with rodent filth.

We hold, therefore, that the Government proved beyond a reasonable doubt that the defendants violated the Act as alleged in the information.

II.

Pursuant to the standards of criminal liability for violations of the Act set out in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), the trial court held that Mr. Gregory was a person in a position of sufficient authority and responsibility in the conduct of the business of the Gregory corporation to be held personally and strictly liable for violations of the Act committed in the course of such corporate business.

Judge Gordon expressly rejected Mr. Gregory's contention that this standard was the improper legal criterion for measuring his personal liability for the violations. Mr. Gregory seeks to undermine the *Dotterweich* standards and cites certain state court cases and scholarly writings challenging the lack of a *scienter* requirement in criminal cases, and here in particular because the standard fails to require a causal relation between the individual and the violation of the Act.

Dotterweich has been cited and reviewed many times. It was a divided opinion (5 to 4) by the Supreme Court, Mr. Justice Frankfurter writing for the majority and Mr. Justice Murphy for the minority. The fact that it was a drug case rather than a food case is not a proper distinguishing factor. *United States* v. *Dianovin Pharmaceuticals, Inc.*, 1 Cir., 475 F.2d 100, 103, cert. denied, 414 U.S. 830 (1973). At this point it is sufficient to quote the *Dotterweich* majority at pages 280-281:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint*, 258 U.S. 250. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares . . ." *United States* v. *Johnson*, 221 U.S. 488, 497-98.

And quoting further, at pages 284-285:

> Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission — assuming the evidence warrants it — to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

These standards enunciated by Mr. Chief Justice Taft for a unanimous Court in *United States* v. *Balint*, 258 U.S. 250, 254 (1922), and followed in *Dotterweich, supra*,

320 U.S. at 280-281, were expressly reaffirmed by the Court in a unanimous opinion by Mr. Justice Stewart in *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91-92 (1964). Numerous other federal cases are in accord. See, *e.g.*: *United States* v. *Cassaro, Inc., supra*, 443 F.2d at 157; *Lelles* v. *United States*, 9 Cir., 241 F.2d 21, 23-24, cert. denied, 353 U.S. 974 (1957); *United States* v. *Kaadt*, 7 Cir., 171 F.2d 600, 604 (1948); *United States* v. *Parfait Powder Puff Co.*, 7 Cir., 163 F.2d 1008, 1009-1010 (1947), cert. denied, 332 U.S. 851 (1948).

If the Supreme Court standards of individual criminal liability announced in *Balint, Dotterweich* and *Wiesenfeld Warehouse, supra*, are to be set aside, we shall defer to the Court's collective wisdom in that area. We shall not undertake to overrule the Supreme Court.

Both *Dotterweich* and *Wiesenfeld Warehouse, supra*, state that an individual's claim that his actions do not factually bring him within the corporate liability standards "involves factual proof to be raised defensively at a trial on the merits." (*Wiesenfeld Warehouse*, 376 U.S. at 91.) In light of Inspector Brett's testimony and Mr. Gregory's admissions of his area of responsibility and actions in the operation of the warehouse business, we find and hold that the district court did not err in convicting him of the violations of the Act.

III.

Defendants contend that but one offense is involved in this case since the four bags of food in question were all found in the same warehouse at the same time during the same inspection.

In a petition for reduction of sentence defendants sought to have the multiple penalties of $4,000 assessed against the corporation reduced to $1,000, and the multiple penalties of $2,000 assessed against Mr. Gregory abated or, if allowed, reduced to $500.

A petition for correction or reduction of sentence may be filed pursuant to Rule 35, Federal Rules of Criminal Procedure, Title 18, U.S.C. It is well established that

the grant or denial of such a petition is addressed to the sound discretion of the district court. *United States* v. *Krueger*, 9 Cir., 454 F.2d 1154, 1155 (1972); *United States* v. *Jones*, 2 Cir., 444 F.2d 89, 90 (1971).

It has been held that a four-count indictment charging defendant with receiving foods and allowing the same to become adulterated under §§ 331(k), 342(a)(3,4) was not duplicitous where each count referred to a different food. *Akin Distributors of Florida, Inc.* v. *United States*, 5 Cir., 399 F.2d 306, 307 (1968), cert. denied, 394 U.S. 905 (1969). In *Robinson* v. *United States*, 10 Cir., 366 F.2d 575, 579 (1966), cert. denied, 385 U.S. 1009 (1967), it was held that separate sales of illegal drugs supported separate counts in the indictment brought under § 331(k), although they occurred at the same place and on the same evening. See also *V. E. Irons, Inc.* v. *United States*, 1 Cir., 244 F.2d 34, 45-46, cert. denied, 354 U.S. 823 (1957). It is to be noted that *United States* v. *Wiesenfeld Warehouse Co., supra*, although duplicity was not an issue, reversed the dismissal of an information similar to the one in the case at bar, where the six counts of the information differed only with respect to the particular shipment or product involved. 376 U.S. at 87, fn.3.

Defendants cite other cases dealing with the question of duplicity in other areas of the criminal law, but none in the food and drug field. Since it was established in the instant case that each of the four counts here involved refers to a different food, three of which were received on different dates, we hold that the district court did not err in denying defendants' petition to reduce the sentence.

Finally, defendants urge that Judge Gordon abused his discretion in refusing to revise his decision that they were found guilty of "holding food under insanitary conditions," and to state that "the food examined was not tainted, but was wholesome and fit for human consumption." Defendants argue that this request should have been granted in the face of allegedly harmful newspaper publicity that defendants were "fined for tainted food." We regard this contention as not well taken since this relief was entirely within the discretion of the trial court.

In light of the foregoing, we affirm the decision and judgment of the district court in all respects.

AFFIRMED.

CAMPBELL, *Senior District Judge*, concurring in part and dissenting in part.

I agree that defendants were properly found to have violated Title 21 USC § 331(k) in that they "held" food for sale after shipment in interstate commerce which consisted in whole or in part of a filthy, putrid, or decomposed substance (*i.e.*, the corn meal referred to in Count I), and held food for sale after shipment in interstate commerce under unsanitary conditions whereby it may have become contaminated with filth (*i.e.*, the corn meal, poppy seed, caraway seed and corn grits referred to in Counts I, II, III and IV respectively). However, I respectfully disagree with the finding that defendants were each guilty of four separate violations of the statute.

These defendants were charged in a four-count information with holding adultered food for sale after the interstate shipment thereof in violation of Title 21 USC § 331 (k). Count I charged that corn meal was "adulterated" as that term is defined by 21 USC § 342 (a) (3) and as defined by § 342 (a) (4), i.e., Count I charged that the corn meal consisted in part of a "filthy, putrid or decomposed substance" [(a) (3)] and that it was "held under unsanitary conditions whereby it may have become contaminated with filth . . .". [(a) (4)].

Counts II, III and IV charged, respectively, that poppy seed, caraway seed and corn grits were held under unsanitary conditions and were "adulterated" within the meaning of § 342 (a) (4). The government neither charged nor proved that these foods actually consisted of a filthy, putrid or decomposed substance [§ 342 (a) (3)].

If the government had charged and proved adulteration as defined by § 342 (a) (3) as to each of the four kinds of food held for sale by the H. B. Gregory Co., I would agree that defendants may properly be found to have committed four separate violations of Title 21 USC

§ 331 (k), and accordingly, I would not consider separate sentences as to each count improper. But where the government charges three separate offenses (Counts II, III and IV) under § 343 (a) (4) because three different kinds of food are being held, and proves but *one* unsanitary condition (i.e., the unsanitary condition of the building in which the foods are stored), I believe the maximum sentence that should be imposed is that which may be imposed for a single violation of the Act, a fine not to exceed one thousand dollars and/or imprisonment for not more than one year. 21 U S C 333 (a).

To hold otherwise conditions the extent of a defendant's criminal liability not only on his failure to provide a sanitary environment for the foods held for sale, but also on whether defendant has held one, ten, twenty or one hundred different *kinds* of food on the premises, irrespective of the quantity thereof. To illustrate the problem thus presented, imagine the potential liability of a supermarket manager in charge of a mice-infested store. The government's proof of this single unsanitary condition could, under the majority's view, sustain separate convictions, potentially allowing consecutive one year prison terms, for each of the hundreds of different kinds of food held for sale on the premises. At the same time, the owner of a warehouse wherein large quantities of only one kind of food are stored could not receive a sentence in excess of one year in prison, plus a fine of one thousand dollars.

To avoid the prospect that such fortuitous circumstances could distinguish the criminal liability of one defendant from that of another, I would hold that if the government chooses to prove adulteration solely on the basis of § 342 (a) (4), a defendant's maintenance of an unsanitary facility within which foods are held for sale should be considered the conduct proscribed, regardless of how many different kinds of foods are stored therein, and that therefore only one sentence may be imposed.

I am not persuaded that *Akin Distributors of Florida, Inc.* v. *United States*, 399 F.2d 306 (5th Cir. 1968); *Robinson* v. *United States*, 366 F.2d 575 (10th Cir. 1966); *V. E.*

Irons, Inc. v. *United States*, 244 F. 2d 34 (1st Cir. 1957); or *United States* v. *Wiesenfeld Warehouse Co.*, 376 U S 86 (1964), cited by the majority, are authority to the contrary.

In both *Robinson* and *V. E. Irons, Inc.*, defendants were charged with multiple counts of "misbranding" drugs. Neither case involved "adulteration"; neither case imposed multiple penalties on the basis of a single act or omission; neither case involved 21 USC § 342 (a) (4).

The Fifth Circuit's decision in *Akin* involved both § 342 (a) (3) and § 342 (a) (4). The brief opinion in that case states that "appellant had received foods and allowed same to become adulterated within the meaning of Title 21 USC § 342 (a) (3) and (a) (4) . . .". 399 F.2d at 307. The opinion does not disclose whether or not a finding of guilty was sustained as to any count in which evidence showed adulteration only within the meaning of § 342 (a) (4), but a reasonable inference may be drawn that the government proved adulteration under § 342 (a) (3) as to each of the different kinds of foods claimed to have become contaminated. The basis for so inferring is found in the court's statement that "the evidence supporting the alleged adulteration of the food named in each count was different for each food." 399 F.2d at 307.

Finally, the *Wisenfeld* decision dealt solely with the question of whether the act of "holding" food for sale under unsanitary conditions whereby it may become contaminated with filth constitutes a violation of § 331 (k). The Court answered that question in the affirmative. Whether a defendant could be sentenced separately on the basis of each of the several kinds of food so held was not an issue in *Wiesenfeld* and was not considered by that Court.

Accordingly, I would affirm the convictions under Count I and would affirm as to Counts II, III and IV on the basis that they constitute but one offense. Consistent with this view, I would vacate two of the one thousand dollar fines imposed upon the corporate defendant, and

would vacate two of the five hundred dollar fines imposed upon Mr. Gregory.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX 2

Opinion of the District Court of the Eastern District of Wisconsin.

Opinion of the District Court on Defendant's Motion to Dismiss

"The Court has concluded that the motion to dismiss may not be granted. I'm persuaded that the Government has made out a Prima Facie case on the specific point that Mr. Friend has raised; namely that there's inadequate proof of actual contamination of the food. I think the issue is resolved by 21 U.S.C. 342(a)(4). The statute does not, is not phrased in terms of actual contamination; but rather that it may become contaminated because of insanitary conditions. That's consistent with holdings of the Court of Appeals for the Eighth Circuit in **Berger v. United States,** 200 Fed. 818, and it's also consistent with **United States v. An Article of Food, Pasturized Whole Eggs** decided by the District Court, reported in 339 Fed. Supp. page 136. So the motion for dismissal of the charges may not be granted."

Transcript of March 26, 1973, page 132.

Opinion of the District Court at end of Trial

"The Court finds that each of the four counts is proved against each of the defendants. The comments that I previously made I think cover the principal issue of sufficiency of the government's case on the question of proved adulteration. I don't think any further comments in that section are necessary.

The other issue raised more specifically in this argument after both sides have fully rested relates to the re-

sponsibility of James H. Gregory, the individual, and I think the case law is adverse to Mr. Gregory's contention, that it imposes personal liability upon him because of the authority and responsibility which he had, and that the defendant Mr. Gregory's contention that the general law requires a specific knowledge or failure to do the best he can is not applicable under the statutory scheme adopted by the Congress or by the case law, particularly Dotterweich in 320 U.S.

Accordingly, the Court makes a finding of guilt as to each of the four counts, as to each of the two defendants, and upon such findings of guilt, enters judgments of conviction as to each of the four counts as to each of the two defendants."

Transcript of March 26, 1973, pages 139-140.

Opinion of District Court
Imposing Sentence

(Addressing Defendant's Attorney) "I am sorry for the plaintiff, Mr. Friend. I do not agree with your analysis of the law on the matter and, further, I am not sympathetic with your contention that the defendants are victims of a — innocent victims of an invasion by unsuspected mice.

I think this is a shocking failure on the part of the Defendants to maintain clean and unadulterated circumstances after having been amply, fully, vigorously warned of their deficiencies.

I find no justification for the Defendants' inability to maintain these food products in a safe fashion. The design for interstate shipment, the law required sanitation. Mr. Gregory and the Gregory Company have woefully

failed in that, and, in my judgment, they must be punished in some fashion consistent with the authorization of law.

The law contemplates up to $1,000.00 for each offense; and a substantial fine, in my judgment, should be imposed.

I don't believe it is an appropriate case for imprisonment, but I would suggest that further violations would unquestionably provoke such imposition of imprisonment, in my judgment.

I am mindful of the communications that Mr. Friend has referred to, namely, the report of Mr. Schultz, the gentleman who now represents that corrective sanitation proceedings have been made, and that's an appropriate process; it's just unfortunate that it wasn't done in 1971 or 1972 when the Defendants were admonished that they had a problem.

I will now proceed with formal sentence.

On March 26, 1973, James H. Gregory and the H. B. Gregory Company were found guilty after court trial as to a four count Information charging violation of Sectiion 331(k), Title 21 of the Code.

The Court having asked the Defendant why judgment should not now be pronounced and no cause to the contrary appearing to the Court, and the Defendant and his attorney, that is, Defendant James H. Gregory and the attorney for the Defendants, having made a statement in mitigation of sentence, it is the sentence and judgment of this Court that you, James H. Gregory, be assessed a fine of $500.00 for the offense charged in Count 1; $500.00 as to Count 2; $500.00 as to Count 3, and $500.00 as to Count 4, making a total fine of $2,000.00.

The H. B. Gregory Company, a corporation, is assessed a fine of $1,000.000 for the offense charged in Count 1; $1,000.00 as to Count 2; $1,000.00 as to Count 3, and $1,000.00 as to Count 4, making a total fine for the H. B. Gregory Company, a corporation, in the amount of $4,000.00: A total fine of $2,000.00 for James H. Gregory, an individual.

It is the further order of this Court that the fine is to be paid within a period of ten days.

Transcript of June 11, 1973, pages 5-8.

APPENDIX 3

Reply Brief which the Petitioners were denied leave to file in the Circuit Court of Appeals by order of the Court dated July 3, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 73-1744

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

H. B. GREGORY CO., a corporation
and
JAMES H. GREGORY, an individual
Defendants-Appellants

Reply brief of Defendants-Appellants on Motion for Rehearing By The Court in Banc

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I.

Are the Defendants entitled to the benefit of tolerances under 21 U.S.C.A. par 346 of the Food Drug and Cosmetic Law?

a) When the Pure Food and Drug Law was adopted in 1906, no provision was made for tolerances. The statute was amended in 1938 and an express provision for tolerances was introduced at that time, 21 U.S.C.A. par. 346. The concept was that it is impossible to maintain 100% purity of food products. On or about February 20, 1974, Dr. Alexander M. Schmidt, the Commissioner of

the Food and Drug Administration appeared before the monopoly Subcommittee of the U.S. Senate, of which Senator Gaylord Nelson of Wisconsin was Chairman and made the following statement:

"I could go into the kitchen of the home of every individual in this room and shut it down as unsanitary. We could readily shut down every pharmaceutical plant in the United States if we went in as I would go into your kitchens, looking for dirt." Milwaukee Sentinel, February 21, 1974

The chief proponents of the amendment relating to tolerances were the farmers and their congressmen, and in particular, the apple growers in the State of Washington. They were accustomed to spraying their apple trees against worms. The spraying left minute quantities of lead on the apples, and the amendment was intended, among other things, to require the government to certify what amount of lead might be tolerated, provided always that it did not constitute a threat to the health of consumers.

Similarly the government established a tolerance level for mould in tomato paste, the amount of the tolerance being 40% mould.

In U.S. v. 1500 Cases more or less 236 F. 2d 208, 214 (1956) the court held that tomato paste with more than 40% mould should be condemned and that tomato paste with less than 40% mould could not be seized. This decision recognized the tolerance and followed the statute.

In the Gregory Case, the tolerance established by the government is one excreta fragment per 50 grams. Does two pellets in a 100 pound bag of corn meal exceed the tolerance? If not, there should have been no conviction

on the first count, which charged the defendants with holding adulterated food for sale. There is no testimony that two pellets in a 100 pound bag exceeds the tolerance. When the defendants sought to elicit this information, the government witnesses replied that they did not know what the tolerance level was.

The prosecution suggests that because Inspector Brett removed the two pellets from the 100 pound bag with a teaspoon, the contents of the teaspoon constitute a proper asure for determining whether the tolerance was exceeded.

This is unfair to the defendants. Inspectors in the Chicago Office of the Food and Drug Administration would take a 10 pound sample of 100 pound bag, 10 being the square root of 100. The question would then be whether two pellets in 10 pounds exceed the tolerance. The prosecution would rule Sec. 406 out of the Food Drug and Cosmetics Law and regards the law to be as it was before Section 406 was adopted. (Footnote 2 of Appellee's answer to motion for rehearing, page 3).

This is contrary to the holding in **U.S. v. 1500 Cases more or less** 236 F. 2d 208, 214 (1956) Supra, and it also does violence to the canons of statutory construction developed by the courts.

"Unless a legislative intention to the contrary clearly appears, special or particular provisions control over general provisions, terms, or expressions."

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b) The prosecution suggests that if the corn meal described in Count 1 was not proven to be adulterated beyond the permissible tolerance levels, still it was held un-

der unsanitary conditions. (Appellee's Answer to motion for Rehearing Pages 4-6). This would equate Count 1 with Counts 2, 3, and 4. Under Judge Campbell's reasoning the defendants would have committed a single offense, not four offenses, and be subjected to a single fine. When dealing with a first offense in an unintentional misdemeanor case, a single fine without multiplication should be enough.

II

a) Can the number of counts for which an accused may be convicted be safely left to the tender mercies of the prosecutors?

The history of prosecutions, both in England and the United States, tells us that it may not. Prosecutors are advocates who tend to ride the currents of popular feeling. In the 17th Century when people feared witches, the prosecutors brought multiple counts of witchcraft against elderly women. In the 18th Century, when people feared revolution, the prosecutors brought multiple counts of seditious libel against the publishers of newspapers. In the 19th Century, when people feared rape, the prosecutors brought multiple counts against people accused of raping white women, but brought a single charge of disorderly conduct against people accused of raping black women. In the 20th Century, the prosecutors bring multiple counts against wholesalers and warehousemen who have mice. According to the Cleveland Press of June 14, 1974 the Kroger Company and three of its executives have been indicted on ten counts of storing food in a warehouse in Solon, Ohio, where it was accessible to rodents. This bears out the prophecy made in Judge Campbell's dissenting opinion in the Gregory Case.

The quotation from **U.S.A. v. Dotterweich,** 320 U.S. 277, 285 (1943), which appears on page 8 of the brief for the prosecution, calls for the wise guidance of judges. It is they who are to temper the advocacy of the prosecutors by looking to the ultimate facts rather than the number of counts. On the ultimate facts in the Gregory Case there was but one offense, holding food for sale under unsanitary conditions, and there should be but one fine.

b) The case against the defendant, James H. Gregory, does not rest on any guilty intent or actionable negligence, but on the circumstances that he was the president of the H. B. Gregory Co., for which he was responsible. Prior to 1943, when **U.S.A. v. Dotterweich,** supra, was decided, he would have gone free. This judicial legislation is criticized upon constitutional grounds in James J. Hippard's article "The Unconstitutionality of Criminal Liability Without Fault, an argument for a Constitutional Doctrine of Mens Rea".

10 Houston Law Review 1039, 1047, 1052, 1057, July 1973 University of Houston College of Law.

If Mr. Gregory is to be punished at all, it appears that a single fine is enough.

Respectfully submitted,

/s/ Henry C. Friend
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-142

H. B. GREGORY COMPANY
AND
JAMES H. GREGORY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend:

(1) that the foods described in the information filed against them were not "adulterated" within the meaning of Section 402 of the Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040 *et seq.*, as amended, 21 U.S.C. 342;

(2) that the four-count information charging that they had violated Section 301(k) of the Act, 21 U.S.C. 331(k), by causing four different types of food to become adulterated was duplicitous;

(3) that the president and treasurer of a corporation who is personally in charge of its sanitation program, including its rodent control program, cannot be held criminally liable under Section 301 for the adulteration of food in the corporation's warehouse resulting from the presence of rodents; and

(4) that the district judge erred by telling petitioner James H. Gregory at sentencing that if he violated the Act in the future he would be imprisoned.

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioners were each convicted on all four counts of an information charging them with having caused four different foods to become adulterated, in violation of 21 U.S.C. 331(k). The petitioner corporation was sentenced to a fine of $1,000 on each count, for a total of $4,000, and Mr. Gregory was sentenced to a fine of $500 on each count, for a total of $2,000 (Pet. App. A2-17—A2-20). The court of appeals affirmed (Pet. App. A1-1—A1-15).

The information charged that H. B. Gregory Co., a Wisconsin corporation which supplies ingredients to bakeries throughout the Milwaukee area and operates a bakery supply warehouse, and its president and treasurer, James H. Gregory, violated 21 U.S.C. 331(k) by receiving foods that had been shipped in interstate commerce, holding such foods for sale in their warehouse following the interstate shipment, and, because their warehouse was infested by rodents, causing the foods to become adulterated.

Count 1 of the information charged that bags of cornmeal were adulterated because they consisted in part of a filthy substance, *i.e.*, rodent excreta (21

U.S.C. 342(a)(3)), and because they were held under insanitary warehouse conditions whereby they may have become contaminated (21 U.S.C. 342(a)(4)). The remaining three counts of the information charged that three other types of food—poppyseed (count 2), caraway seed (count 3) and corn grits (count 4)—were adulterated because they were held under insanitary warehouse conditions whereby they may have become contaminated.

The facts are set forth in the opinion of the court of appeals (Pet. App. A1-3—A1-6) and are not in dispute. The evidence established that the foods in question had been shipped in interstate commerce and were being held for sale in the company's warehouse. An inspector from the Food and Drug Administration testified that he inspected this warehouse and found extensive evidence of rodent infestation, which was later confirmed by laboratory analysis. Apart from the general insanitary condition of the warehouse, the inspector testified that 75 percent of the small rodent traps in the warehouse were unbaited.

During his inspection, the FDA inspector discussed the insanitary conditions of the warehouse with Mr. Gregory, who said that he was president and treasurer of the company and that he was at the firm "on a daily basis" and was personally in charge of the sanitation program, including the rodent control program.

The defense rested without presenting any evidence, and the district court found both petitioners guilty on all counts.

The court of appeals, one judge dissenting in part, affirmed the judgments of conviction. The court held as to each count of the information that the food was adulterated because it was held under insanitary warehouse conditions whereby it may have become contaminated, and that the cornmeal in Count 1 was also adulterated because it consisted in part of a filthy substance (Pet. App. A1-1—A1-8). As to Mr. Gregory's responsiblity under the Act, the court held that he was criminally liable under the standards set forth in *United States* v. *Dotterweich,* 320 U.S. 277, in that he shared responsibility in the business process resulting in the violation. The court expressly rejected his contention that this standard of criminal responsibility is improper (Pet. App. A1-8—A1-10). Finally, the court stated that the four-count information charging petitioners with receiving foods and permitting them to become adulterated within the meaning of Section 402(a)(4) of the Act was not duplicitous, because each count of the information referred to a different food (Pet. App. A1-10—A1-11).

Judge Campbell agreed that the food was adulterated and that petitioners were criminally responsible under the Act, but dissented in part because he believed that the information was duplicitous and that petitioners were guilty of only two offenses.[1] Under his interpretation of the Act, if the government charges three separate offenses under Section 402(a)(4) because three different kinds of food are being held for sale, but proves only one insanitary condition, then there has been only one violation of the Act (Pet. App. A1-12—A1-14).

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[1]Under Judge Campbell's interpretation of the Act, petitioners would be guilty of one offense under Count 1 of the information in that the cornmeal was adulterated within the meaning of Section 402(a)(3). The remaining three counts of the information would have constituted the other offense.

1. The third question presented in the petition for a writ of certiorari—whether criminal liability could properly be imposed upon a corporate executive under the facts of this case—is similar to one of the questions presented in the government's pending petition for a writ of certiorari in *United States* v. *Park*, No. 74-215. Although we believe that question to have been correctly decided in this case, the Court may wish to defer action on the present petition until the disposition in *Park*. The remaining questions presented were correctly decided below and do not raise any issue warranting further review.

2. Petitioners contend that the food was not adulterated because the rodent excreta did not exceed the tolerances established pursuant to Section 406 of the Act, 21 U.S.C. 346. Section 406 is not relevant to the adulteration questions in this case. Section 402(a) of the Act, 21 U.S.C. 342(a), defines seven types of adulterated food, including food containing any added poisonous or added deleterious substance which is unsafe within the meaning of Section 406 (402(a)(2)), food containing filthy substances (402(a)(3)), and food held under insanitary conditions (402(a)(4)). Section 406 tolerances are applicable only in determining whether food is adulterated for purposes of Section 402(a)(2), concerning added poisonous or deleterious substances. The charges in this case alleged that all four kinds of food were adulterated within the meaning of Section 402(a)(4) and that the cornmeal was adulterated within the meaning of Section

402(a)(3). The information did not contain any allegation of adulteration in violation of Section 402(a)(2). Accordingly, there is no question of Section 406 tolerances in this case.[2]

3. The court of appeals correctly held that the four-count information was not duplicitous. Section 402 (a)(4) of the Act states that "[a] *food* shall be deemed to be adulterated * * * if it has been * * * held under insanitary conditions whereby it may have become contaminated * * * " (emphasis supplied). Each count of the information referred to a different food that had become adulterated within the meaning of this section. The criminal offense prohibited by Section 301(k) of the Act is the doing of any act with respect to "a food" which results in the food becoming adulterated as that term is defined in Section 402. Therefore, the express language of the Act imposes criminal liability for each particular food that becomes adulterated. See *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86;[3] *Akin Distribs. of Florida, Inc.* v. *United States*, 399 F. 2d 306, 307 (C.A. 5); cf. *V.E. Irons, Inc.* v. *United States*, 244 F. 2d 34, 45-46 (C.A. 1), certiorari denied, 354 U.S. 923; *Robinson* v. *United States*, 366 F. 2d 575, 579 (C.A. 10), certiorari denied, 385 U.S. 1009.

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[2]FDA has also established "defect action levels" for purposes of providing administrative guidance in enforcing Section 402(a)(3). See Current Levels for Natural or Unavoidable Defects in Food for Human Use that Present No Health Hazard, Department of Health, Education, and Welfare (March 1974). The so-called "tolerance" quoted in the petition (p. 4) is in fact a "defect action level." The defect action level guidelines are not applicable to prosecutions for Section 402(a)(4) adulteration. 21 C.F.R. 128.10(c).

[3]In *Wiesenfeld* this Court reversed the dismissal of a six-count information. Each count alleged that the food described therein was adulterated because it may have become contaminated through storage in an insanitary warehouse. The Court noted that the counts differed "only with respect to the particular shipment or product involved." 376 U.S. at 87, n. 3. The opinion does not expressly discuss any question of duplicity.

4. The district judge's statement that further violations by Mr. Gregory would result in imprisonment does not warrant consideration by this Court. The statement merely reflects the trial judge's present thought with respect to action he would be likely to take in a hypothetical future case, which, if it even arises, might well not be assigned to him. Moreover, the statement is not improper. A trial judge can comment upon the defendant's conduct at the time of sentencing. *Page* v. *United States,* 462 F. 2d 932, 934, n. 2 (C.A. 3); *Jordan* v. *United States,* 370 F. 2d 126, 128-129 (C.A. 10), certiorari denied, 386 U.S. 1033; *Montgomery* v. *United States*, 344 F. 2d 955 (C.A. 10); *Simmons* v. *United States*, 302 F. 2d 71, 77 (C.A. 3). The comment was within the discretion of the district judge and did not invalidate either the judgment of conviction or the sentence.[4] *Montgomery* v. *United States, supra.* In addition, Mr. Gregory did not receive the maximum penalty provided in Section 303 of the Act , 21 U.S.C. 333 (Pet. 4).

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[4]A careful examination of the trial transcript does not reveal any evidence of bias on the part of the district judge. If Mr. Gregory believes that Judge Gordon would be prejudiced against him in a future trial, his remedy is to request the district judge to recuse himself at that time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied. As to question 3, however, the Court may wish to defer action until its disposition of *United States* v. *Park, supra.*

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OCTOBER 1974.

DOJ-1974-10